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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC, d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' OPENING BRIEF.

MORTON B. JACKSON,
1901 Avenue of the Stars,
Suite 1651,
Los Angeles, Calif. 90067,
Attorney for Petitioner Golden State Bottling Co., Inc.

GILFORD G. ROWLAND,
Forum Building,
Suite 707,
Sacramento, Calif. 95814,
Attorney for Petitioner All American Beverages, Inc.

Of Counsel:
JACKSON & GOODSTEIN,
ROWLAND, CLOWDUS & PARKER.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' OPENING BRIEF.

Their Petition for Writ of Certiorari having been accepted by this Court on February 26, 1973, Petitioners Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento[1] are now before this Court seeking reversal of the Opinion of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on August 21, 1972.

[1]Hereinafter Golden State Bottling Company, Inc. will be referred to as "Golden State" and All American Beverages, Inc. as "All American" and collectively the two will be referred to as "Petitioners" or "Employers."

Opinions Below.

Petitioners come before this Court to seek reversal of the decision of the United States Court of Appeals for the Ninth Circuit below which affirmed and enforced without modification the Supplemental Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board") which, in turn, adopted without change the decision of its Trial Examiner. These decisions, in chronological order, were as follows:

1. On July 13, 1970, the Trial Examiner, Robert L. Piper, executed and filed the Trial Examiner's Supplemental Decision which is incorporated into the decision of the Board. This decision, as incorporated, is reproduced as Appendix "A" to the Petition for Certiorari filed herein (the decision and recommended order of the Trial Examiner, together with the decision of the Board, shall hereafter be referred to collectively as the Board's "Supplemental Decision").
2. On January 21, 1971, the Board upheld the Trial Examiner *in toto* and adopted his Supplemental Decision and Order. This Decision has been reported in 187 NLRB No. 142, 76 LRRM 1868 (1971) and is contained in the single Appendix, commencing on page 56 thereof.
3. The "*Per Curiam*" decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion"), Judge Kilkenny dissenting, affirmed and enforced *in toto* the decision of the Board. The Opinion is

reported as 467 F.2d 164 (9th Cir. 1972), and is reproduced as Appendix "B" to the Petition for Writ of Certiorari.

4. Along with its Opinion, the Court of Appeals for the Ninth Circuit also rendered its Judgment as set forth in Appendix "C" to the Petition for Certiorari. This Judgment grants enforcement of the Board's Supplemental Decision in all respects.

Grounds for Jurisdiction in This Court.

The Opinion below decides and applies several important questions of federal law contrary to decisions of this Court and several Courts of Appeals, as well as certain important federal questions of first impression. On this basis, Petition for Writ of Certiorari was made to this Court on November 8, 1972 pursuant to 28 U.S.C.A. Section 1254 and U.S. Sup. Ct. Rule 19. On February 26, 1973, this Petition was granted. ___ U.S. ___.

The Opinion below was dated and entered on August 21, 1972; no order was sought or made respecting rehearing or respecting an extension of time within which to petition for Certiorari.

Constitutional Provision and Statutes Involved.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes invoved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 1(b); 2(3); 7; 8(a)(1), (3); 10 (b), (c), (e), (f) as Amended, (29 U.S.C.A. Sections

141(b); 152(3); 157; 158(a)(1), (3); 160(b); 160 (c); 160(f)) as well as Rule 65(d) of the *Federal Rules of Civil Procedure* (28 U.S.C.A.). The constitutional provision and the statutes cited are, in pertinent part, printed verbatim and are reproduced as Appendix "D" to the Petition for Writ of Certiorari previously filed by Petitioners.

Questions Presented.

In its deceptively simple Opinion, the Court of Appeals plows large sections of new ground in the field of labor law. It fastens upon *both* parties to the bona fide purchase and sale of a business virtually unlimited joint and several liability, prospectively and retroactively, to remedy the unfair labor practices of the seller by approving and actually applying, for the first time in its full sweep, the Board's so-called "*Perma Vinyl* doctrine." In so doing, the Opinion raises the following questions:

1. If the owner of a business sells and transfers its entire ownership and interest in that business to a bona fide third party purchaser in a bona fide transaction:
   (a) Can the liability of the seller to remedy past unfair labor practices be extended past the time of such sale and continued *ad infinitum* in spite of the fact that the seller is thereafter incapable of terminating this liability?
   (b) Can the bona fide purchaser be held liable, jointly and severally with the seller, to remedy such unfair labor practices, not only prospectively from the time of the sale and transfer, but retroactively, for the en-

tire period prior thereto, by virtue of the mere fact (assumed *arguendo*) that it takes with knowledge of such unfair labor practice?

(c) Can such pre-sale knowledge be established by "imputation", *ex post facto*, merely by virtue of the buyer's post-sale retention of supervisory personnel formerly employed by the seller?

(d) If knowledge cannot be established by such imputation, has the Board satisfied its burden of proving such knowledge merely by discrediting the adverse testimony of its own witnesses on the issue and by drawing adverse inferences from Petitioners' failure to call officers of the purchaser in order to corroborate the negative testimony of the General Counsel's witnesses on the point?

The Opinion further establishes several new and rather startling principles of application to the specifics of the familiar back pay and reinstatement remedies uniformly ordered in wrongful discharge cases under the Act, thus giving rise to the following further questions:

2. If an employer is found to have discharged an employee wrongfully and discriminatorily in violation of Section 8(a)(3) of the Act:

(a) Can such employer be required to pay to such employee back pay beyond the time when, as found by the Board, such employee would, in any event, have voluntarily terminated his employment relationship with the company?

(b) In compliance with the customary order to "offer such employee reinstatement to his former or substantially equivalent position," can an employer be required to offer "reinstatement" to a non-employment position by establishing such former employee in an independent business?

(c) In compliance with the usual order to pay back pay to such employee/discriminatee, can the employer be required to pay compensatory damages to such employee for loss of anticipated profits from an independent business which had yet to be established, particularly where such employee has no prior independent business experience?

Statement of the Case.

(1) Summary of Proceedings Below.

The Board's original order herein was issued on 10 June 1964. It found that Golden State had committed certain unfair labor practices, including the wrongful discharge of Kenneth L. Baker[2] (hereinafter referred to simply as "Baker") on 16 August 1963. The Board's order included, as to Baker, the customary remedies of reinstatement and back pay.

Review of this order was sought by Golden State in the United States Court of Appeals for the Ninth Circuit. That court handed down a decision in December 1965,[3] granting enforcement as to certain portions of

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[2]A violation of Sections 8(a)(1) and 8(a)(3) of the Act.

[3]*NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

the order, including those relating to Baker, while denying it as to other significant parts. As a consequence of circumstances explained below, this decision did not become final until 27 November 1968, almost three years later.

In the compliance phase of the matter which ensued, a disagreement arose regarding the Board's interpretation of certain events occurring between the time of the Board's original order and the final decision granting enforcement. This interpretation, in Petitioners' view, expanded the remedies ordered in a manner which exceeded the Board's powers in the premises.

As a consequence, the matter went to Supplemental Proceedings upon a back pay specification issued as against both Golden State and its successor-in-interest, All American. Following hearing, a decision was issued by the Trial Examiner on 13 July 1970,[4] which was adopted without modification by the Board on 21 January 1971,[5] (collectively, the Supplemental Decision).

The Supplemental Decision confirmed the Board's expanded views regarding the subject remedies, as proposed by the General Counsel. Accordingly, Petitioners sought review in the Court of Appeals for the Ninth Circuit; the Board, in turn, cross-petitioned for enforcement. That court, on 21 August 1972, handed down its decision, *per curiam* (one member dissenting), granting enforcement of the Supplemental Decision in its entirety.

A Petition for Certiorari filed with this Court on November 8, 1972 was granted on February 26, 1973.

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[4]Appendix A to the Petition for Writ of Certiorari previously filed herein.

[5]App. 56.

(2) Facts Upon Which This Case Arises.

The original dispute herein involved, in addition to the §§ 8(a)(1) and 8(a)(3) charges relating to Baker, many other issues of rather more importance (as originally viewed by Golden State). Although each issue, including those relating to Baker, was vigorously contested, the Board rendered its opinion upholding the majority of the charges. The portions of the Board's order relating to Baker ordered the customary remedies of reinstatement and back pay; that is to say, it ordered Golden State to offer to Baker reinstatement to his former position, or a substantially equivalent one, and, further, ordered the employer to make him whole for any back pay loss suffered as a consequence of his wrongful termination.

The employer sought review of the entire Board order in the Court of Appeals which, as noted above, handed down a decision on 2 December 1965 agreeing with Golden's State's contentions in many respects by denying enforcement as to significant portions of the Board's order, while enforcing the balance, including the portions relating to Baker.[6] The Board's petition for rehearing was denied on 4 January 1966.

On 4 April 1966, however, the court granted a Board motion requesting that it reconsider this denial of rehearing. In November 1968, some two and one-half years following this submission, the court, upon such reconsideration, reaffirmed its original denial of rehearing. As a consequence, it was not until 27 No-

[6] *NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

vember 1968 that the court's final decree implementing this first decision was actually entered [App. Cert. 1-2].[7]

During the hiatus occurring between the Board's original order in June 1964 and the entry of the Court of Appeals' enforcement decree in November 1968, two separate events occurred. Both of these set in motion circumstances which, as noted above, bear vitally on the issues herein. They are the same events giving rise to the disagreement over compliance which led to the necessity for Supplemental Proceedings. These events were (a) the subcontracting of the majority of Golden State's sales routes to independent distributors commencing 1 October 1964, and (b) Golden State's sale and transfer of the remaining portions of its Pepsi-Cola business to All American on 31 January 1968.

(a) *Subfranchising of Routes.*

Prior to October 1964, the distribution function of Golden State's Pepsi-Cola operation had been carried out through the medium of employee driver-salesmen, each operating on an assigned route within the Company's franchise territory.[8] On 1 October 1964, Golden State began contracting out this activity through-

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[7]References to the Single Appendix submitted herewith are designated "App." References to the Appendix attached to the Petition for Writ of Certiorari previously filed herein are designated "App. Cert." References to the record reproduced as "Volume I Pleadings" are designated "R." References to the reporter's stenographic transcript of the hearing filed with the Court are designated "Tr." References to the exhibits introduced by the General Counsel are designated "GC Ex." References to exhibits introduced by Petitioners are designated "Pet. Ex."

[8]Golden State had other business interests in addition to its Pepsi-Cola business. These other interests, however, were separate, and the Pepsi operation was the only aspect of Golden State's operations which involved soft drink bottling or distribution.

out the major part of its franchise territory, to independent distributors [App. Cert. 4-5; App. Cert. 17; App. 219-220; App. 237-239; Pet. Ex. 3]. As it did so, it eliminated a majority of the old driver-salesman positions and, to that extent, curtailed or cut back on the scope of its distributive activities.

The Trial Examiner determined that these distributors were, in fact, independent contractors [App. Cert. 17]. This finding was based on undisputed evidence that these distributors received no salary or commissions, but, rather, depended for compensation on any net profits earned after deduction of operating expenses, inventory costs, etc. from their gross sales proceeds. The distributors were responsible for furnishing their own equipment and hiring and paying whatever manpower they needed. They were free to extend credit, bore all risk of loss,* including risks of collection and were not subject to supervision.

Ultimately, Golden State terminated well over fifty percent of its distribution operation through this subcontracting. The company, however, always retained (and its successor still retains) a few "house routes" operated by employee driver-salesmen.

In effecting this transition, the initial distributors, for the most part, were recruited from the ranks of the driver-salesmen, to a selected number of whom distributorship contracts were offered. Not all of them, however, were given that opportunity [Tr. 189; App. 206-208; App. 213-214; App. 102B].

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*Two of the driver-salesmen who became independent distributors for Golden State went bankrupt [Tr. 271-273]. Two other driver-salesmen who became distributors asked for and obtained back their positions as driver-salesmen after they were unable to succeed as distributors [Tr. 272].

By this change,

1. Golden State went out of the soft drink distribution business in those areas which were subcontracted to distributors;
2. Those driver-salesmen who accepted distributorship contracts voluntarily left the employ of Golden State to go into business for themselves; and
3. Golden State continued to bottle Pepsi-Cola products, but restricted its distributive operation to those portions of the franchise territory still retained as "house routes."

Until the time of the sale, therefore, Golden State was always in a position to offer reinstatement to Baker as a driver-salesman, in the sense that a few such positions still existed; the same is true as to All American following the sale.

While the issue was sharply contested before the Trial Examiner, the Board found on conflicting evidence (and Petitioners do not here dispute) that Baker would have been offered an independent distributorship had he not been previously terminated and that he would have accepted the same and become a distributor as of 1 October 1964 [App. Cert. 19].

It may also be noted that Baker, shortly following his original discharge, obtained other, permanent employment, which ultimately proved to be better paying than his old job, and he was still so employed at the time of the hearing [App. 102B].

(b) *Sale of the Pepsi-Cola Bottling Business.*

Effective 31 January 1968, Golden State sold its Pepsi-Cola Bottling Division to All American [App. Cert. 6]. Under the sale agreement, All American pur-

chased the entire assets of the Pepsi-Cola operation, but assumed only certain specific liabilities. As a part of the transaction, the distributorship contracts, with the written consents of the individual distributors in each case, were assigned by Golden State to All American [App. 60]. This sale terminated all activity on the part of Golden State in the soft drink bottling and distribution business.

The purchaser, All American, was a Delaware corporation having its principal offices in Providence, Rhode Island, which, among other enterprises, conducted Pepsi-Cola bottling and distribution operations in Springfield, Ohio [App. 60; App. 119; App. 132; App. 38]. Prior to the purchase in question, it had no assets or activities in the Sacramento area.

It is undisputed, indeed the Board found, that the transaction was entirely bona fide, in the sense that it was negotiated at arm's length between independent parties, was in no way collusive or evasive of the Board's order and that it did not in any way involve or result in a disguised continuance of Golden State's original ownership [App. Cert. 8].

(c) *The Issue of Knowledge.*

The only significant disputed issue touching the sale was the question of whether or not All American had actual pre-sale knowledge of the proceedings arising out of Baker's discharge.

The agreement of sale was silent as to the pendency of these proceedings, and no mention was made of Golden State's possible liability thereunder. Such liability was not one of those specifically enumerated in the agreement as being assumed by All American [App. 80], rather, the agreement contained the usual provision warranting that no pending litigation existed.

Two witnesses were called by the General Counsel on this issue: (a) Edwin J. Crofoot, the controlling shareholder and President of Golden State; and (b) Gene Schilling, General Manager of Golden State's Pepsi-Cola operation who, subsequent to the sale, was employed by All American in the same capacity with the title of "President" of the Sacramento Bottling Division.[10]

Both of these witnesses testified that the unfair practice proceedings involving Baker were never mentioned in the course of the negotiations and were never disclosed to or discussed with All American [App. 170-172, 119, 121, 127-128, 129-130]. They explained that this was due simply to oversight. The case had not been regarded as one involving a significant degree of liability because of Baker's speedy reemployment. Furthermore, it had lain dormant for so long at the appellate level that its continued pendency was simply forgotten.

The Board, faced with a total lack of affirmative evidence on an issue as to which it carried the burden, "solved" its problem by first discrediting entirely the testimony of both Crofoot and Schilling on the issue [App. Cert. 13].

This discreditation was based on a sort of comedy of errors arising from a failure of communication. Since the first appeal, Golden State had been represented in these proceedings by Morton B. Jackson, Esq. of Los Angeles in the latter's capacity as labor counsel to the Sacramento Bottlers Association, of which Golden

[10]Schilling never became an officer of All American and at no time pertinent herein was he a shareholder of that corporation. Neither was he ever a shareholder of Golden State, although, up until the time of the sale to All American, he was corporate secretary.

State was (and All American now is) a member [Tr. 284-286]. His retainer was confined to labor matters only and he had, as a consequence, no knowledge of the negotiations or the agreement which culminated in the sale of the business to All American, nor did he become aware of the fact of the sale itself until the Fall of 1969, when he was preparing a response to the original back pay specification herein [App. Cert. 6 and 7].

In connection with the sale of the business, Golden State was represented throughout by its regular corporate counsel, A. I. Diepenbrock, Esq. of the Sacramento firm of Diepenbrock, Wulff, Plant & Haggegan [App. 117].

Because of this failure of communication, when the proceedings entered the compliance phase following the entry of the Court of Appeals' enforcement decree in November 1968, Jackson's initiatives vis-a-vis the Board with respect to compliance were undertaken in the belief that he was continuing to represent Golden State and that Golden State continued to own Sacramento Pepsi-Cola. The successorship issue did not become apparent, therefore, either to the Board or to Jackson until much later.

Nonetheless, the Trial Examiner chose to discredit Schilling upon the equivocal fact that he signed several documents purportedly on behalf of Golden State subsequent to the sale of the business and at a time when he was no longer employed by that company or authorized to act in its behalf. These documents included the following:

1. A Substitution of Attorney dated 14 November 1968, signed by Schilling purportedly on behalf of Golden State [App. 82].

2. A Certificate of Posting of a Notice concerning unfair labor practices also signed by Schilling on or about 11 December 1968 [App. 93].

3. Golden State's answer to the original back pay specification verified by Crofoot in early November 1969 [App. Cert. 14].

In addition to the foregoing, the Board also points to the letter offer of reinstatement (discussed below) dated 11 December 1968 [App. 91], despite its unequivocal character.

These documents, of course, were the natural consequence of the confusion resulting from the fact that neither the Board nor Golden State's attorney were aware, at the time the Court of Appeals' order of enforcement was entered in November 1968, that All American had purchased the business and had, for some ten or eleven months, been its new owner. Schilling, on the other hand, signed the documents tendered to him by the experts on the understandable assumption that they knew what they were doing.[11]

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[11] "Mr. Jackson, I am not an attorney. All of these labor problems started under the name of Golden State Bottling Company, which to me is the Pepsi-Cola Bottling Company. These letters were prepared either by you or the National Labor Relations Board; the contents of them I was aware of. I assumed that inasmuch as they were started against the Golden State Bottling Company they would be concluded against the Golden State Bottling Company. Frankly, I wasn't aware of the fact that I was signing Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento. As a matter of fact, on Exhibit G.C. 21(a), the bulletin which we posted on the bulletin board, that is, the 'Employer's Golden State Bottling Company, Employer, d/b/a Pepsi Cola.'

"I shouldn't say that. G. G. Schilling, President. I was referring to Gene G. Schilling, President of Pepsi-Cola Bottling Company, a division of All American Beverages. Finally, I just—I wasn't aware of this." [App. 200-201].

As a consequence of this misunderstanding, the Board's usual notice and certificate of posting was routinely issued and sent to Schilling for signature on behalf of Golden State, the original employer in the proceedings; similarly, Jackson, whose office affiliation had changed, prepared a Substitution of Attorney upon the same assumption and secured Schilling's signature thereon; in the same vein he prepared an answer on behalf of Golden State to the original backpay specification which was verified by Crofoot on behalf of that party.

Just why all of this perfectly explainable *post-sale* conduct should give rise to such sinister conclusions affecting credibility or in any way reflect on the pre-sale state of All American's knowledge is not entirely clear. Certainly the appearance of these equivocal and anomalous documents was confined to this brief period and did not continue following counsel's discovery of the fact of sale.

In addition to the foregoing, the Board pointed to certain alleged "contradictions" in Schilling's and Crofoot's testimony regarding the extent of Schilling's participation in the sale negotiations—a "conflict" which disappears completely when other portions of the testimony of the same witnesses are viewed.[12]

It is Petitioners' position in this matter that the Board's reasons for discrediting the testimony that no

[12]The Board has attempted to support the action of the Trial Examiner in discrediting witnesses Schilling and Crofoot by reliance on Trial Examiner's statement that each had testified that Schilling played no part in the settlement negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling had attended the first negotiating meeting, and (ii) that Schilling had held individual private talks with the purchaser regarding his future status [App. 117-119]. Moreover, Schilling confirmed this [App. 164-165].

knowledge existed, whether tenable or untenable, are irrelevant in determining the actual existence of any pre-sale knowledge on the part of All American. However, since the Board below relied quite heavily upon the foregoing matters, and its extensive designation of the record (Single Appendix) relating to such matters indicates that it will continue to press these points, Petitioners, in anticipation of the Board's position, have included them in its factual statement despite their arguable relevancy.

(d) *The Offer of Reinstatement.*

After the final order of the Circuit Court was rendered in November 1968, a good faith attempt was made to comply with its provisions. However, the Trial Examiner in his Supplemental Decision held that such efforts, and the events which proceeded them (those two events described above), were insufficient to terminate the continuing accrual of liability.

On 11 December 1968, within a matter of days following the entry of the Court of Appeals' decree of enforcement, a written offer of reinstatement was transmitted to Baker. This offer was written on the letterhead of the "Pepsi-Cola Bottling Company of Sacramento" and was signed by one Gene Schilling as "President" [App. 91]. No reference may be discerned anywhere in the letter or letterhead to either Golden State or All American. The offer was quite unequivocal on its face and simply offered Baker reinstatement to his old job as a driver-salesman.

At the time this offer was made, All American had been the new owner of Pepsi/Sacramento for almost a year. Gene Schilling, the signatory, was the "President" of the Sacramento Bottling Division of All American.

He had been Golden State's General Manager of the same operation prior to the sale [App. Cert. 5-6].

(e) *The Supplemental Decision.*

In the supplemental proceedings, the employer took the position that an unequivocal offer of reinstatement to Baker of his former position as a driver-salesman would satisfy the reinstatement portions of the order, and that the back pay portions would be satisfied by the payment of whatever sums would have been earned by him in that position less offsets attributable to interim earnings in his new job.

The Board disputed this, claiming that the distributorships, regardless of whether they be viewed as incidents of employment or independent contract,[13] represented a "promotion" which Baker would have received but for his wrongful discharge and that the employer's duty, under the order was therefore to offer him (a) a distributorship, and (b) not to pay him back pay, but, rather, consequential damage in the form of back profits which he would have earned as a distributor subsequent to 1 October 1964.

Under the employer's view, the back pay award would not have been large; under the Board's view, it was of considerable magnitude, since a distributor's

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[13]When asked to set forth his position on this issue, the General Counsel stated "Our position will be that whether or not these individuals were independent contractors is really irrelevant insofar as the standpoint of remedy for Mr. Baker's discharge is concerned. We would certainly concede that if Mr. Baker had been an independent contractor at the time of his discharge, there would have been no violation, but since there is no such contention, our position is that it is really not relevant. We are talking about remedy here, not the scope of violation." [App. 104-105].

profits, when profits were indeed earned, could exceed the salary and commissions paid to employee driver-salesmen.

The original back pay specification was framed to pose only the issues reflected by this dispute. When Jackson discovered the fact of the sale, he immediately notified the Board which, in turn, withdrew the original specification in order to consider the applicability of the successorship issue [App. Cert. 2]. The amended specification joined All American as a party and sought to impose upon it joint and several liability with Golden State, on the theory that it took with knowledge of the unfair practice proceedings. The matter went to hearing upon the issues framed by the amended specification.

The Supplemental Decision ultimately required something quite different from what was contemplated in the original order as enforced by the Court of Appeals:

Golden State, and All American as well, were ordered to pay to Baker not back salary but the "profits" he would allegedly have realized as a distributor. Instead of being required to reinstate Baker to his former job, both employers were ordered to offer him a distributorship/sub-franchise.

In addition to the foregoing, the Board also held the original employer, Golden State, liable for such "reinstatement," as well as "back pay" accrual, *subsequent* to the sale of its business and beyond the time when it had any power to offer or perform any reinstatement of any kind as to Baker.

Further, the Board imposed coextensive liability, retroactive as well as prospective, upon All American, concededly a bona fide purchaser.

Summary of Argument.

The issues in this case may be grouped under two principal heads:

(a) Those relating to the extent to which remedial liability for unfair labor practices can be imposed against the seller/predecessor and the purchaser/successor of a business; and

(b) Those relating to the sweep of the remedy itself without regard to the party against whom imposed.

In this area of seller/purchaser liability, the Circuit Court below has adopted and applied, for the first time in its full sweep, the Board's so-called *"Perma Vinyl* doctrine" first enunciated in the decision of that name (*Perma Vinyl Corp.*, 164 NLRB No. 119, 65 LRRM 1186 (1967)). The decision in this respect contravenes settled lines of authority established by this Court and the holdings of the other circuits. This *Perma Vinyl* doctrine is not only unsupported by authoritative decisions and legislative sanction granted in the Act, but also represents a far less sound approach in national labor policy.

Only twice before has this doctrine ever been considered by the Courts of Appeals—once by way of *dictum*, in the Court of Appeals for the Ninth Circuit[14] and earlier, by way of partial application only, in the Court of Appeals for the Fifth Circuit.[15]

Even should the resolution of this conflict by the Court result in the adoption and approval of the

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[14]*United Auto Workers v. NLRB*, 442 F.2d 1180 (9th Cir. 1971).

[15]*United States Pipe and Foundry Company v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

"*Perma Vinyl* doctrine", however, a further issue, in the within cause, would be presented by reason of the Board's failure to establish the purchaser's prior knowledge of the seller's unfair labor practices, a requisite for the application of the doctrine in any event. In this regard, Petitioners seek a determination of the question whether the technical devices resorted to by the Board and the court, in an effort to raise and support such a finding as a substitute for evidence, are not offensive to the fundamental notion of due process.

Under the second basic head, this Court is first presented an issue, which, if decided in conformity with Petitioners' contentions, would be dispositive of all issues presented herein by mooting each of them. This issue revolves around the voluntary termination of employment by Baker which, consonant with earlier Board and Court decisions (but in contradiction to the court's holding herein), would also terminate any further liability of Petitioners to remedy this unfair labor practice.

Two further questions involving the extent of the Board's remedial powers under the Act, both of first impression, are presented. Petitioners urge that the Order which required them, ostensibly by way of reinstatement, to establish the discriminatee Baker in an independent business, exceeds such powers. Additionally, they urge that a purported back pay award which, in actuality, amounted to an order to pay consequential damages in the form of anticipated profits in an independent business likewise exceeds such powers.

ARGUMENT.

I.

The Board's "Perma Vinyl Doctrine" Contravenes the Authority Established by This Court and Several Courts of Appeals.

This matter, in Petitioners' view, is a fairly straightforward "back pay" case. Had the Board applied the settled principles applicable to such cases, the matter would not now be before this Court. Instead, however, the Board chose to apply the novel and comprehensive doctrine first articulated in *Perma Vinyl Corp., supra,* enforced in part only, *sub. nom. U.S. Pipe and Foundry Co., supra.*

In *Perma Vinyl,* the Board required a bona fide purchaser/successor corporation having pre-sale knowledge of its predecessor's prior unfair practices, to offer reinstatement to employees discharged in violation of the Act. It did not require the purchasing corporation to pay remedial back pay; it did not hold the selling corporation liable for reinstatement or for back pay beyond the date of the sale. However, the Board did not stop there. It announced that thenceforth, as a rule of prospective application, even though a purchaser and the sale itself be wholly bona fide and a genuine transfer of ownership, the Board would nonetheless hold the seller *and* the buyer liable *jointly and severally* for both reinstatement *and* back pay, if the purchaser took with prior knowledge of the unfair labor practice proceeding.

In so doing, it not only far exceeded the scope of its holding in the case before it; it also reversed itself on it own established doctrine, and contravened several prior Court of Appeals' holdings and at least three decisions of this Court on the points in question.

Two fundamental aspects of remedial liability are involved: those of a predecessor/seller, and those of a successor/purchaser.

Prior decisions of this Court and other circuits were and are clear that the accrual of liability on the part of a seller to remedy unfair labor practices is terminated by the bona fide sale and transfer of the business in question:

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263; 13 L.ed. 2d 827; 85 S. Ct. 994 (1965), (herein referred to as "*Darlington*");

Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106; 86 L.ed. 718, 724; 62 S. Ct. 452 (1941), (herein referred to as "*Southport Petroleum*");

NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954), (herein referred to as "*New Madrid*");

NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963), (herein referred to as "*Herman Pet Supply*");

Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967), (herein referred to as "*Makela Welding*").

Prior to *Perma Vinyl* it had been equally clear, from settled decisions of this Court and other circuits, that the bona fide purchaser of a business, in a transaction which constituted a genuine arms-length, non-collusive sale and transfer, took free of any liability for the predecessor seller's unfair labor practices, whether such purchaser took with or without knowledge thereof:

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L. ed. 661, 65 S. Ct. 478 (1945), (herein referred to as "*Regal Knitwear*");

NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953), (herein referred to as "*Birdsall-Stockdale*");

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954), (herein referred to as "*Lunder Shoe*");

NLRB v. Herman Bros. Pet Supply, supra.

To be distinguished is the situation (concededly not present here), where the purchaser has participated in or acted in concert with his predecessor in the commission of the unfair practices charged, and could thus be held independently liable as a primary wrongdoer (*Cf. Regal Knitwear, supra*).

Perma Vinyl not only conflicts with the foregoing two lines of authority; it also conflicts with previously settled Board doctrine on the same point:

Symms Grocer Co., 109 NLRB No. 58, 34 LRRM 1326 (1954), (herein referred to as "*Symms Grocer*");

M. Eskin & Son, 148 NLRB No. 107, 57 LRRM 1121 (1964), (herein referred to as "*Eskin*").

The foregoing three separate lines of authority will be developed and discussed below in examining their specific application to the holding in the case at bar. For the moment, however, let us continue our examination of *Perma Vinyl* itself.

The Board decision therein was reviewed, on enforcement proceedings, by the Court of Appeals for the Fifth Circuit, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB, supra* (herein referred to simply as "*U.S. Pipe and Foundry*"). That Court noted some of the con-

trary decisions, principally those of *Birdsall-Stockdale, supra,* and *Lunder Shoe, supra,* but did not attempt to reconcile the conflicting lines of authority. In effect, it settled for the fact that it disagreed with them and agreed with the Board's rationale—up to a point. It enforced the decision in respect of its specific holding, that is to say, in requiring the successor to offer reinstatement only; and it pointedly withheld approval of the balance of the Board's broad language, both that affecting joint and several liability of successors and predecessors in every respect, and also that touching the specific area of liability for back pay.

In brief, *U.S. Pipe and Foundry* gave something considerably less than unqualified approval to the *"Perma Vinyl* doctrine," as the Board viewed it.

In *United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971), (herein referred to as *"United Auto Workers"*) the Ninth Circuit declined to enforce liability for the predecessor's unfair labor practices against a bona fide purchaser corporation which took, *arguendo,* with knowledge where the business after changing hands was not essentially the same as previously. This was the extent of the court's holding. Nevertheless, in a concluding paragraph, the court, by Judge Tuttle (on assignment from the 5th Circuit), went on to express uncritical approval of the entire breadth and sweep of *Perma Vinyl,* omitting even the caveats expressed by his own Circuit in *U.S. Pipe and Foundry.* This language, we submit, is quite beyond the actual holding and, therefore, *dictum* in the premises.

Until the Board and court holdings below in the case at bar, the so-called *"Perma Vinyl* doctrine" amounted to no more than that, namely, an announced

policy which had never actually been fully applied in a decided case. The case at bar transports Perma Vinyl from the realm of announced doctrine into actual holding, and thus, for the first time, poses the full conflicts envisaged by the court in *U.S. Pipe and Foundry*.

The full extent of those conflicts may be understood only when one appreciates that *Perma Vinyl* utilizes a bona fide change of ownership as a means of multiplying liability in that it adds to the picture another party against whom full recourse may equally be had, while preserving the same amplitude of recourse against the transferor even following the sale. Settled principles would regard such a sale as a cut-off point; the Board seems to view it as a flood gate.

The curious thing is that the Board itself, in formulating the doctrine, did not address itself to the contrary authority posed by its own *Eskin, Symms Grocer* line of decisions, or even advert to the *Darlington/Southport Petroleum/New Madrid/Herman Pet Supply/Makela/Regal Knitwear/Lunder Shoe/Birdsall-Stockdale* lines of authority. Nor did it answer the arguments posed by these cases. It simply avoided them (although it cited, inexplicably, *Regal Knitwear*). It relied, instead, upon cases totally inapposite: *John Wiley & Son v. Livingston*, 376 U.S. 543, 11 L.ed. 2d 898, 84 S. Ct. 909 (1964), (herein referred to as "*Wiley*"), a case which, as we point out below, involved contractual liability; *Liberty Electronics Corp.*, 143 NLRB No. 64, 53 LRRM 1370 (1963), also involving contractual liability *specifically assumed* by the purchaser; and *NLRB v. Colten*, 105 F.2d 179 (6th Cir. 1939), in which there was simply no true change of ownership, and therefore no genuine sale.

A. The Application of the Perma Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cut-Off Point of a Bona Fide Sale Is Contrary to Settled Authority of This Court and Offensive to Principles of Due Process.

The Board found that Golden State's sale of its Pepsi-Cola division was a genuine sale and transfer of the whole of that business, at arms-length, to a bona fide purchaser which, until that time, had been a stranger to Golden State and to Sacramento. Effective with that transaction, Golden State went out of the soft drink business and terminated all activity in that and related fields. Following the sale, Golden State was, therefore, no longer capable of offering or performing on reinstatement as to Baker.

The law applicable to such a situation is set forth in *Darlington, supra,* wherein this Court quoted with approval, in support of its holding, the following language from *New Madrid* (380 U.S., at page 271):

> "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred."

More specifically pertinent to the point before us here is the following further language from *New Madrid* itself, not actually quoted by this Court in *Darlington,*

but certainly approved by implication (215 F.2d, at page 914):

> "And the Act affords no basis on which to order a person to reinstate employees in a business which he had . . . actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor relations control in particular . . . [citing *Southport Petroleum, supra*] . . . No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise."

The Court of Appeals for the Sixth Circuit affirmed these same rules in the more recent cases of *Makela Welding, supra,* and *Herman Pet Supply, supra.*

The foregoing lines of authority clearly would exonerate Golden State from further accrual of remedial liability past the time of the sale, whether for back pay accrual or reinstatement.

The Board decision herein, based on *Perma Vinyl,* held directly contrary, finding Golden State liable for "back pay" and "reinstatement" in the same breadth and extent as though the sale had never taken place. One may search the original decision in *Perma Vinyl,* in vain for any authority to support this aspect of the holding. Equally absent is any mention of the foregoing contrary authority.

The Court of Appeals, in its Opinion, expressly declined to comment on the propriety of the Board's Order in this respect on the basis that "Golden State had agreed to indemnify All American" for back pay

liability assessed against it and, since its Opinion confirmed All American's liability in this respect, Golden State would have to pay in any event. The court dismisses any further consideration of this subject by concluding that Golden State thus "concedes" such post-sale liability by virtue of its agreement, despite the fact that Golden State's very participation in this rather lengthy and costly proceeding demonstrates precisely that it concedes nothing of the sort.

There are several things wrong with the court's conclusion in this respect, both factually and legally. Principally, we may observe that it does not disturb or modify the Board's Order in any respect. Thus primary liability for remedial action post-sale has been adjudged against Golden State, jointly and severally with All American, regardless of whether Golden State might be secondarily liable to indemnify All American against losses as a consequence of private agreement.

The court is apparently saying that the existence of possible secondary liability moots the question of Golden State's primary liability since Golden State must pay in any event.

The two types of liability, however, are quite different, and the existence of one most assuredly does not moot the other, for each carries with it wholly different incidents. Golden State's liability to All American under its warranty can only be enforced by All American in the event of actual loss suffered by it, and any attempt by All American to recover on such an agreement would be subject to any valid defenses available to Golden State who, it must be remembered, is a major creditor of All American under the Purchase Agreement.

In other words, the existence of a secondary obligation to indemnify does not by any means assure that Golden State would have to pay in any event. On the other hand, the existence of primary liability does so assure, particularly if All American were to become insolvent. Furthermore, it guarantees that Golden State would be subject to the threat and sanction of contempt proceedings if it did not pay, and it strips away any defenses it might have against All American as well as any right to require the Board to proceed first against All American.

Further, the "Agreement" of which the court speaks, is nothing more than the obligation stemming from the warranty contained in the Purchase Agreement against pending litigation which, Crofoot acknowledged, would certainly entitle All American to indemnity if indeed it suffered any loss, in view of Golden State's oversight in failing to disclose the existence of these proceedings prior to the sale.[18] The foregoing makes it as clear as anything possibly could that the only thing Crofoot "agreed to" was the existence of an obligation to indemnify All American arising out of the warranty which had inadvertently been breached.

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[18]As noted above, the basis for the Trial Examiner's reference to such an indemnity obligation stems from the following testimony of Crofoot at the hearing: [App. 123] question: (by Mr. Barton) "During the course of your recent discussion with representatives of All American, did you or did you not agree to indemnify All American for whatever losses it might sustain as a result of these proceedings?" Answer: [Crofoot] "I discussed it with Mr. Schilling and told him that *I thought the contract covered our liability for any losses that might be sustained*, but that if it didn't, I would be happy to so guarantee." (Emphasis supplied). As we have pointed out above, the contract did in fact contain a warranty against pending litigation, whose breach would of course have given rise to an obligation to indemnify, and it is clearly this to which Crofoot is referring.

The foregoing demonstrates, Petitioners submit, that the Court of Appeals' rather blithe equation of Golden State's contingent and secondary liability to All American with the direct primary liability represented by its judgment of enforcement is quite without justification, and that the existence of the former possibility by no means moots the implacable certainty of the latter.

The Opinion also ignores the implications of holding the seller liable for the performance of an act, namely reinstatement, which it is incapable of performing. The absurdity of such a ruling is underscored by the Board's own holding that the offer of reinstatement made to Baker eleven months following the sale was invalid because, among other things, Golden State, having sold the bottling business, "had no such job" [App. Cert. 25].

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process.

It is undisputed that All American was a bona fide purchaser of Golden State's soft drink bottling operation, that it was a stranger to the business, in no way identified with its predecessor and "in no sense an alter ego" [App. Cert. 8]. It is further undisputed that the sale was wholly bona fide, that it resulted in a genuine transfer of the seller's entire interest. It was not even suggested, therefore, that the transaction was collusive or entered into as a part of any scheme or plan to evade or frustrate the Board's original order.

In other words, All American was wholly innocent of wrongdoing; there was no evidence whatever of any conspiracy, fraud, evasion, or other ground for independent liability on its part. There existed, therefore, no basis or relationship, "which might of itself establish liability" against All American. *Regal Knitwear*, 324 U.S., at page 15.

Furthermore, All American was never made a party to the wrongful discharge proceedings and was provided no opportunity to participate in the litigation of that matter. To the contrary, it merely purchased the bottling business without assuming this liability from a seller which had warranted, in the Purchase Agreement, that no litigation pended.

Under settled principles, All American could not, thus, be held to answer for the unfair practices of Golden State. Nevertheless, the Supplemental Decision, and the Opinion in turn, fastened upon All American total liability, jointly and severally with Golden State, for reinstatement and "back pay" accruals, both before as well as after the sale.

The cited authorities were those discussed above: *Perma Vinyl*, *U.S. Pipe and Foundry* and *United Auto Workers*.

The proposed Order was drawn in the language of Rule 65(d) of the Federal Rules of Civil Procedure.[17] In *Regal Knitwear*, *supra*, this Court held that this Rule

[17]Federal Rules of Civil Procedure 65(d): *The Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

could not be used to extend the reach of the Board orders to "successors" or "assigns" who were innocent of a wrongdoing and against whom there existed no independent basis for adjudging liability. In so doing, the Court clearly excluded the notion that a purchaser, simply by taking with knowledge of a predecessor's peculations, could be held to answer in the same measure, if the sale were otherwise bona fide and the transfer of ownership genuine.

As stated by this Court in that case (324 U.S., at page 13):

> "The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not yet been adjudged according to law."

Even the language of the Act itself prohibits such an extension of liability. Section 10(c) thereof provides, in pertinent part, as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in a complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . ."

With this language in mind, the Board itself stated, in *Symms Grocer*, as follows:

> "Having re-examined the legal basis for its determination in the original decision herein that Idaho

[successor] was responsible for remedying the unfair labor practices of Symms, the Board now believes that it lacks any statutory authority to make any such determination. Section 10(c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." (34 LRRM, at page 1327).

This line of reasoning was again confirmed by the Board in its decision in *Eskin, supra.*

The Board reasoning in this respect finds its echo in the direct holdings of no less than three Circuits, each of which takes *Regal Knitwear* as the touchstone. One of the first to deal with the subject was the case of *Birdsall-Stockdale, supra,* where the court stated (208 F.2d, at page 237):

"While administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, the courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

"Where successors and assigns are in active concert or participation with a defendant or respondent in the violation of an order, or are instrumentalities through which the defendant or respondent seeks to evade an order, they are brought within the scope of contempt proceedings by Rule 65(d), supra.

"Orders of the National Labor Relations Board are binding upon successors and assigns whose operations are 'merely a disguised continuance of the old employer.'. . .

"The Supreme Court, in the *Regal Knitwear* case, made it clear that those decisions were predicated, not merely on succession, but on a consideration of the relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65(d), a relationship not present in the instant case." (Emphasis supplied).

This position was echoed by the First Circuit in *Lunder Shoe, supra* (1954), and again by the Sixth Circuit in *Herman Bros. Pet Supply, supra* (1963), in which the courts held that if there was, in fact, a bona fide discontinuance and true change of ownership, the new owner would not be subject to the Board's order, and the duty of reinstatement thereby terminated.

As noted, it is undisputed here that there exists no independent basis for assessing liability against All American.

Opposed to this unbroken line of authority, *Perma Vinyl* stands virtually alone, except for the limited holding in *U.S. Pipe and Foundry,* the dictum in *United Auto Workers* and, finally, the square holding in the case at bar.

As we observed above, the Board, in the original *Perma Vinyl* decision, dealt with the wealth of authority opposing its conclusions by the simple expedient of ignoring it. It attempted to support its holding principally by reliance upon the decision of this Court in *John Wiley & Sons v. Livingston, supra,* a case having nothing

to do with unfair labor practices, but dealing instead with obligations which, as noted by the Court, not only were contractual and therefore consensual in origin, but were, additionally, mandatory by New York statutory law. *Wiley* was limited to a decision regarding a successor corporation's liability to arbitrate certain issues pursuant to the collective bargaining agreement executed by its predecessor. Its extension, by analogy, to the liability of a successor for the unfair labor practices of a predecessor, was specifically rejected by this Court, when the contention was advanced to it, in the case of *NLRB v. Burns International Security Service*, 406 U.S. 272, 32 L.ed. 2d 61, 92 S. Ct. 1571 (1972). The problem was dealt with in the following language (32 L.ed., at page 72);

> "We do not find Wiley controlling in the circumstances here. Wiley arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized 'the preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of national labor law,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. ID., at 549, 551, 11 L.ed. 2d at 904."

The Court went on to state, on the same page:

> "Its [*Wiley*] narrower holding dealt with the merger occurring against a background of state law which embodied the general rule that in merger

situations the surviving corporation is liable for the obligations of the disappearing corporation."

In other words, if *Wiley* itself did not make it quite clear, *Burns International Security Service, supra,* underscored the fact that *Wiley* was not authority for extending or even affecting settled principles regarding the liability of successors in unfair labor practice cases.

In this respect *Perma Vinyl* is also contrary to common law. See, for example, *Schwartz v. McGraw-Edison Co.*, 14 Cal. App. 3d 767, 92 Cal. Rptr. 776 (1971); *Kloberdanz v. Joy Mfg. Co.*, 288 F.Supp. 817 (D.C. Colo. 1968). This fact is quite significant when one realizes that *Wiley*, the only authority cited by the Board to support *Perma Vinyl*, was premised upon a statutory mandate of New York. In the case at bar, state law requires a result opposite to that reached in the court below.

The force of this authority (*Burns*) was quite apparent to Judge Kilkenny in the case at bar, who based his dissent to the portions of the opinion dealing with predecessor/successor liability squarely upon the authority of this decision, observing that it could not be reconciled with *Perma Vinyl.*

Even considered apart from the crushing weight of the authority opposing it, *Perma Vinyl* does not justify its own sweeping conclusions or assumption of authority, since the articulated policy considerations on which it rests cannot withstand analysis.

Preliminary to these, the Board acknowledges that the doctrine operates to impose liability upon a bona fide purchaser which was not a party to the unfair labor practices and which operates a business having

no connection with its predecessor [App. Cert. 10]. Nevertheless, by way of "balancing the equities," the Board invokes the following considerations:

1. We are not here concerned with designated individual employers; rather it is an "employing industry" that is sought to be regulated and brought within the Board's corrective and remedial powers.

2. When a new employer is substituted *in the employing industry*, there is no real change *in the industry*, so far as the victims of past unfair practices are concerned or the need for remedying those practices.

3. A need remains to erase the effects of those practices; only against the successor can the most effective remedial responsibility be imposed.

4. This works no hardship upon the successor, since he is the "beneficiary" of the unremedied, unfair practices!

Each of these conclusions falls apart upon closer examination. First off, one cannot sidestep due process requirements merely by lumping individual employers together and submerging their identities in an "employing industry." Such a broad brush sweeps every industry employer into the same hat, whether connected with the predecessor business or not. The logical extension of this reasoning would empower the Board to order remedial liability in respect of Baker against the Hires bottler or the Royal Crown bottler, or any other soft drink

bottler in Sacramento, or anywhere else for that matter.[18]

Furthermore, the grand assumption that a change of ownership represents no change at all is a wholly unfounded and unwarranted conclusion. Ownership is significant precisely because it is the fountainhead of control and therefore of policy and management attitudes. The very thing we are concerned with here is labor policy and the employer's attitude toward employee rights under the Act. Thus, a change of ownership is the most significant and fundamental possible change that could take place so far as impact upon labor relations.

The assumption underlying the Board's wholly unreal "no change" dogma is that a successor's labor attitudes and policy will, in every instance and respect, represent merely a continuation of the predecessor's and, presumably, that the successor therefore needs to be set straight as badly as did the predecessor. This is a complete *non-sequitur* and amounts to presuming the guilt of a wholly innocent party.

Nor does it follow at all that the erasure of past wrongs can only be accomplished by tarring the new employer with the stigmata of wrongdoing and requiring him to utter the customary *mea culpa* and assurances of future good conduct. Nothing could be better calculated to *revive* and *prolong* the miasmal effects of earlier wrongdoing than thus to identify the successor with the unfortunate practices of his predecessor.

Neither does it follow that the only proper remedy for past unfair practices is to be found against the suc-

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[18]The Board's assumption that it is authorized, in the first instance to "regulate" whole industries is highly debatable in itself. The Act only empowers it to assure that the labor policies of individual employers conform to its provisions.

cessor; in fact, the opposite is true: If any effective remedy is to be found, it is against the former employer within the limits imposed by his relinquishment of the business. If a successor employer refuses to bargain, supports a company union, wrongfully discharges, interrogates or otherwise coerces employees, or commits any other unfair labor practice, he is immediately and properly subject to Board proceedings and ultimate sanctions. However, the process of charge, proof and conviction cannot be dispensed with by simply running off a new copy of the old order and holding the new employer responsible under its terms. Such an expedient result is only gained at the total sacrifice of an innocent party's most fundamental rights, and to no really beneficial purpose.

Nor can it properly be said that the rights of an employee victim of unfair practices are prejudiced by a bona fide sale to any extent not present where unfair practices are totally absent. Mergers, sales, consolidations and other changes and reorganizations in the form of business are frequently entered into for the precise purpose of improving efficiency by eliminating duplicative costs and overlapping or excess positions. The consequent discontinuance of jobs in such situations is a relatively common business experience. *Perma Vinyl* would accord to the wrongfully discharged employee a degree of security in this respect which he would not otherwise have and which the Act nowhere purports to bestow.

What the Board is really saying, in its insistence upon "continuity," is that an employee, apparently, should at all events be protected against the consequences of change. As pointed out by this Court in *Burns, supra,* this runs counter to the most fundamental

attributes of a dynamic free economy which retains its vigor for the very reason that business organizations and business relationships are *not* static, but are constantly changing, developing and growing. The type of penalty which *Perma Vinyl* would fasten upon employers could only inhibit this healthy and ultimately beneficial activity by discouraging change and encouraging the sort of policies that lead only to stagnation.

In all of this, the Board is obfuscating a very pertinent distinction which it was first to draw, namely, that existing between cases involving representation and obligation to bargain and those involving employer unfair practices.

In the former, the considerations are wholly different, stemming, as they do, from a process in which it is the employees' action and theirs alone, which determines the representative with whom the employer must bargain. In the latter, however, the determinant is the conduct of the employer itself. Essentially, the employees have no control over the latter; the employer, properly speaking, exercises no control in the former.

It only makes good sense, then, that in cases involving the obligation to bargain, inquiry should be directed toward the identity of the unit before and after a change of ownership, for if the unit and its personnel remain unchanged, it should rarely be necessary to require a new expression of choice, particularly where a settled relationship has endured.

On the other hand, these criteria have no bearing on the question of a successor's liability for wrongdoing it did not commit, and it does not assist us, in sorting out the issues, to confuse the one situation with the other.

The successor employer is surely entitled to a fair chance to establish its own independent image with its new employees, and to articulate and demonstrate its own labor and management policies. To insist upon clothing an innocent successor with the stigmata of prior wrongdoing can only serve to repoison the atmosphere and frustrate enlightened endeavor. This, in return, can hardly serve to promote the best interests of the unit in question or the cause of industrial harmony. It simply rubs new salt in old wounds.

Petitioners urge that *Perma Vinyl* must not only yield to the weight of opposing authority, but that it must fall for lack of any sound or substantive basis in the first instance.

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistant With Due Process, Be Established on This Record.

Even *Perma Vinyl* does not purport to hold a purchaser liable for remedial action where it takes with no prior knowledge of its seller's unfair labor practices.

In allowing this distinction, the Board seems to be acknowledging the force of *Regal Knitwear* by equating such knowledge with the type of "disguised continuance" which comes within the sweep of the *Regal Knitwear*_____, even though, a person can hardly become a wrongdoer simply because he has knowledge of the past wrongs of others.

In any event, the all important fact of pre-sale knowledge must be proved, and the General Counsel had the burden of proving it here, a burden which he failed to sustain. There is no affirmative evidence to show any preexisting knowledge on All American's part; on

the contrary, every bit of truly probative evidence in the case indicates otherwise.

Both Schilling and Crofoot, called by the General Counsel, testified positively that neither had mentioned the existence of any unfair practice charges or proceedings to any of the All American people at any time prior to the sale or, indeed, subsequently, until after the entry of the Court of Appeals decree in November, 1968. It was that event which revived the long dormant matter and rekindled recollection.

The contents of the Purchase Agreement itself bear them out: nowhere is this proceeding or possible liability mentioned, and the seller warranted that there was no pending litigation. To anyone familiar with the manner in which businesses are actually acquired, this fact alone argues almost conclusively against the existence of prior knowledge, for had All American known of the unfair practice proceedings prior to the sale, no conscientious attorney representing it would have permitted its signature on a document containing a warranty which it knew to be false.

The entire record touching the sale and all activity preceding it contains nothing to suggest the purchaser knew beforehand of the existence of the proceeding; additionally, the testimony of Crofoot and Schilling positively rules it out.

With this state of the record, Petitioners, on their case, did not feel it necessary to summon officers of All American all the way across the country from Rhode Island, merely to offer testimony cumulative to that of Crofoot and Schilling, particularly when the other evidence already in the record only supported Petitioners' contention, and the issue of knowledge was one on which they did not have the burden.

The Board, hard put to come up with a finding of knowledge in this absence of evidence to support it, hit upon an ingenious, if untenable, device. Largely on the basis of their post-sale conduct in putting their names to documents prepared for them by persons who were unaware that the sale had taken place and certain alleged "conflicts" in the testimony of Schilling and Crofoot,[10] the Board simply discredited the testimony of both witnesses completely. Having thus created a vacuum on the issue, so to speak, they filled it by raising an "inference" of knowledge on the basis of Petitioners' alleged failure to call officers of All American to testify on the point.

In other words, faced with the General Counsel's failure to carry his burden, the Board lifted it from his back and shifted it to Petitioners by taxing them in effect with a failure to rebut zero by corroborating, cumulatively, the favorable evidence already in the record.

This artifice was challenged before the court below, which evidently agreed with Petitioners, since it upheld the finding of knowledge on a different basis, without approving, or even mentioning the Board's spurious "inference."

The court observed that the Pepsi operation post-sale was substantially the same as it had been before and that Schilling, Golden State's manager of opera-

[10]It is asserted by the Board that both witnesses testified that Schilling played no part in the sale negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling had attended the first negotiating meeting and (ii) that Schilling had held individual private talks with the purchaser regarding its future status [App. 117-119]. Moreover, Schilling confirmed this [App. 164-165].

tions, was employed by All American in that same capacity following the sale. According to the court, this offered "substantial support" for the Board's finding of knowledge.

In other words, if a sale takes place, the operation is little changed in the process and the predecessor's manager is retained post-sale by the purchaser, then the purchaser, apparently *ipso facto*, may be charged with knowledge of all its predecessor's wrongdoings, whether it actually knew of them or not.

What the court seems to be saying is that All American's post-sale retainer of Schilling, who, of course, had knowledge of the unfair practice proceeding, will be imputed to All American and *ex post facto*, converted to pre-sale knowledge on the part of All American.

We confess that we find this leap even more difficult to follow than the Board's. Any knowledge attributed to All American on such a basis is, of course, a technical fiction and cannot take the place of actual knowledge. Since All American's retainer of Schilling commenced only with its acquisition of the business it had, by definition, to be post-sale. Any knowledge on the part of Schilling which, by imputation, might become All American's knowledge, therefore, could only occur as of the time when Schilling came on All American's payroll, *i.e.*, also post-sale. By no stretch of any rational imagination can this be called pre-sale knowledge except, perhaps, by giving retroactive effect to it—something which mocks the facts and offends the most fundamental notions of fairness. Such technicalities and devices are not appropriate to our concepts of justice.

It does not require great perception to appreciate that there could be no such thing as a *bona fide* purchaser if this type of reasoning were extended logically, let alone carried out to its extreme. Any person acquiring a business would invaribly and inevitably be tainted, *ex post facto,* by the knowledge of the personnel employed prior to the sale and retained by him afterward. Such a policy would, at the least, put a premium on wholesale discharge, at least of supervisory personnel, in the event of an acquisition, and the staffing of management positions only by those untainted with any prior knowledge that might be imputed to a successor.

Arbitrary devices such as those used by the Board and the court below have long been recognized as being manifestly unjust and a violation of due process. In the case of *Western & A. R. Co. v. Henderson,* 279 U.S. 639, 73 L.ed. 884, 49 S. Ct. 445 (1928), this Court dealt with a Georgia statute imposing liability on any railroad company for damages done to persons or property by its trains unless the company proved that it exercised all ordinary and reasonable care and diligence. The plaintiff recovered under this statute by simply proving that her husband was killed in a collision with defendant's train. She offered no other evidence, although the defendant railroad offered much evidence tending to show that it and its employees exercised due care.

In finding this Georgia statute unconstitutional, this Court stated on page 624 as follows:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a

rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In holding this statute to be unconstitutional, the court distinguished a former case which upheld an inference of negligence against a railroad company in similar circumstances by pointing out that this inference disappeared with the introduction of any testimony to the contrary while, in the *Western* case, the Georgia statute created an inference that was given the effect of evidence to be weighed against the opposing testimony, and which was to prevail unless such opposing testimony was found by the jury to preponderate.

In relation to this aspect of the law, also see *Manley v. State of Georgia,* 279 U.S. 1, 6, 73 L.ed. 575, 578, 49 S. Ct. 215 (1928).

The applicability of these cases to the situation before us is clear. There is no rational connection between the fact that All American did not appear to corroborate testimony already given on a matter on which it did not carry the burden and the finding that it had pre-sale knowledge. Furthermore, there is no rational connection between the fact All American retained knowledgeable personnel and the finding that it had pre-sale knowledge.

Moreover in this case, these devices are without even the color of legislative sanction to support them. They were simply plucked from thin air. Clearly such devices must violate the due process principles established in *Western* and *Manley*.

From the foregoing it is evident that the General Counsel failed to establish the existence of All American's pre-sale knowledge of the past unfair practices, which is fundamental to the application of *Perma Vinyl*.

II.

The Scope of the Remedial Order Affirmed and Enforced Below Exceeded the Powers Granted to the Board by the Act.

In the remedial aspect of the Supplemental Decision, as confirmed by the Court of Appeals, the Board erroneously exceeded its power in three respects: (a) it ordered remedial action past the time when Baker, as specifically found, would have terminated his employment relationship; (b) it ordered the employer to "re-instate" an employee into a non-employment situation, *i.e.*, an independent business; and (c) it ordered an employer to pay, under the guise of a "back pay" order, not lost wages, but anticipated profits of an independent business.

As to the first item, the decision represents a violation of doctrine created by the Board itself; the latter two items are conceded by the General Counsel to be matters of first impression.

The resolution of these issues inevitably revolves around the character of the several independent distributorships which replaced the former "house routes"

in the course of Golden State's conversion program which commenced on 1 October 1964. Petitioners throughout have contended that these distributorships were independent businesses and that the distributors themselves were independent contractors, and they offered abundant evidence in support of this contention.

This evidence showed, without contradiction, that the distributors were sub-contractors or sub-franchisees each operating within territories defined by the contracts executed between them and Golden State. Under the terms of these contracts, the distributors purchased products from Golden State which they resold to customers within their territories. They did not earn wages from anyone; if they made money at all, it was by realizing net profits after the deduction of their operating expenses, inventory costs, and so on.

The distributors were responsible for furnishing their own equipment, hiring and paying whatever manpower they needed, and bearing all risk of loss, including the risk of collection.

The distributors were not subject to supervision, were under no restrictions whatever regarding hours of work or *modus operandi*. Their contracts merely specified a certain level of performance in terms of volume, and so long as this criterion was satisfied, their basic contract obligation was fulfilled.

The Trial Examiner found, as facts, all of these fundamental incidents and, at the same time, recognized and found that they spelled out a relationship of independent contract in the following language:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors*, by of-

fering each of them . . . contracts as distributors, or *independent contractors*, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers . . ." [App. Cert. 17]. (Emphasis added).

The General Counsel throughout stoutly maintained that it was irrelevant to the case whether the distributors were considered independent contractors or employees.[20] The reason for this is apparent if thought through: to take a position on the issue would be a concession that the point did indeed have significance and, in turn, to admit, tacitly, if not actually, that the Board's action could be sustained only by finding the distributors to be employees, rather than independent contractors and the emoluments attaching to their positions to be incidents of the employer-employee relationship.

The Trial Examiner, following the General Counsel's lead, also remarked that such finding was really unnecessary [App. Cert. 21-22]; but only after having

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[20]The General Counsel stated: "Our position will be that whether or not these individuals were independent contractors is really irrelevant insofar as the standpoint of remedy for Mr. Baker's discharge is concerned. We would certainly concede that if Mr. Baker has [sic] been an independent contractor at the time of his discharge, there would have been no violation, but since there is no such contention, our position is that it is really not relevant. We are talking about remedy here, not the scope of violation." [App. 104-105].

After Jackson read into the record certain proposed testimony of Schilling relating to the status of the distributor, the General Counsel stated: "I would be willing to stipulate that Mr. Schilling would so testify. I would object to the relevancy of the testimony." [App. 239].

found that the distributors were, indeed, independent contractors, as noted above.

With the foregoing in mind, we turn to an examination of the three specific issues posed above.

A. It Was Error for the Board to Impose Remedial Liability Beyond That Date When Baker Would Voluntarily Have Terminated His Employment With Golden State.

While Golden State originally disputed the General Counsel's contention that Baker would have been offered a distributorship at all, the Trial Examiner and the Board found against it on that issue and held that as of 1 October 1964, Baker would have been offered, and would have accepted, a distributorship. As earlier indicated, this finding had evidentiary support in the record and is, therefore, not disputed here.

This finding, in turn, compels the further finding that, since Baker went into business for himself on that date, his employment by Golden State terminated at the same time, voluntarily and automatically.

In *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006 (1962), the Board held that an employer's liability for reinstatement and further back pay accruals cease to run beyond the date on which the distriminatee would voluntarily have left the company's employ. In that case, the Board said, at pages 1009-1010:

> "Only if the evidence supports a finding that the claimant would have left Respondent's plant . . . in order to obtain this particular new job is his claim from that time disallowed. *A claimant who goes into business on his own is treated similarly to one who obtains interim employment.*" (Emphasis supplied).

Mastro Plastics was enforced in 354 F.2d 170 (2nd Cir. 1965) and Certiorari was denied by this Court (384 U.S. 972).

The Board's and the court's decisions in the case at bar purport to fasten upon both Petitioners' remedial liability extending well past this clearly defined cutoff point in direct conflict with Board enunciated and court approved doctrine. We urge that this error alone requires reversal.

A resolution of this issue in accord with the rule of *Mastro Plastics* would definitively resolve, by mooting, all other issues tendered in this case, since questions of successorship and other aspects of remedial liability would never be reached, this event having antedated the sale by over three years.

B. The Board Exceeded Its Power in Purporting to Order Petitioners to "Reinstate" Baker Into a Nonemployment Situation by Establishing Him in an Independent Business.

On December 11, 1968, within fifteen days following the final determination that Baker's discharge constituted an unfair labor practice, Mr. G. Schilling, "President" of All American's Sacramento Pepsi Division, conveyed an offer of reinstatement to Baker [App. 91]. In so doing, Schilling was attempting to comply with the Board's Order which required him to:

> ". . . offer Baker immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period." [App. Cert. 1-2].

It is not disputed that this offer was transmitted by Schilling upon the recommendation of Jackson, who, at that time, was still unaware that the business had been sold to All American or that Schilling was then in the latter's employ. The Board argued that because of this fact, the offer was, in fact, extended on behalf of Golden State and therefore abortive.

Whatever the dubious merits of this contention, the fact is that the letter, on Sacramento Pepsi's stationery, made a perfectly unequivocal offer of reinstatement to Baker as a driver-salesman with that company. As such, it could unquestionably have been enforced against the company by Baker, whatever Schilling's subjective thoughts may have been at the time he signed it.

Be all this as it may, however, the Board held the offer invalid on the additional ground that reinstatement as a driver-salesman was insufficient in any event since, but for the discrimination, Baker would have become an independent distributor. It therefore held that Baker must be given a distributorship.

In support of this novel conclusion, the Board cited cases holding to the general effect that where, but for the unfair labor practice, a discriminatee would have received a promotion to, say a foreman's job, he must be offered reinstatement as a foreman and his back pay calculated accordingly.[21] The Court of Appeals, supporting its affirmance of the same conclusion, cited a

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[21] *International Union of Operating Engineers, Local 925 (J. L. Manta Inc., et al.)*, 180 NLRB No. 117 (1970); *Mooney Aircraft, Inc.*, 156 NLRB 326, enf'd 375 F.2d 402 (5th Cir. 1967); *Gainsville Publishing Company*, 150 NLRB 602 (1964); and *East Texas Steel Casting Company, Inc.*, 116 NLRB 1336, enf'd 255 F.2d 284 (5th Cir. 1958).

similar case: *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-237 (2nd Cir. 1953).

Petitioners have no quarrel with any of these cases. They are, however, quite inapposite here. The essential matrix for each of them was the employment relationship—in which the Respondent, as the employer, continued to administer employment policy and pay wages, on the one hand, and the discriminatee continued on, without further interruption, as an employee, albeit in an improved situation.

None of these cases dealt with or considered the implications of a situation where the "promotion" or the improvement would necessarily have severed this relationship and terminated, at the same time, all basis for jurisdiction under the Act. Relationships between independent employees are beyond the powers of the Board because they are outside the scope of the Act, which is confined to matters arising out of the employer/employee relationship. This is evident from the outset by the declaration of policy which states:

> " 'It is the purpose and policy of the Act . . ., to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, . . .' "

Furthermore, Section 10(c) of the Act, in enumerating potential remedies, states that persons committing unfair labor practices may be required to cease and desist from such practices and to take such affirmative action including reinstatement of employees, etc., etc. The very use of the term "reinstatement" in conjunction with the word "employee" implies a return of an employee to his former relationship with his employer, namely that of employment.

The Order, as actually rendered in this matter (see above), is couched in the customary language and, as such, conforms with the language of 10(c), and the offer of reinstatement as actually extended to Baker is in literal satisfaction of that Order as formulated. It is only the Board's interpretation, as confirmed by the Court of Appeals, of what is required to satisfy that Order that takes us into the extra-legal realms described above. Literally, if Petitioners had attempted to conform with the Order by offering Baker a distributor's contract, this would not have complied with the Order, since it offered him no position of employment with Golden State.

The General Counsel conceded [App. 104-105], that the Act's reach did not extend to this relationship, since, had the unfair practices here charged been committed with respect to a distributor, there would have been no violation. From this it follows that the remedy attempted here could be set totally at naught, by any respondent so minded, by executing with a discriminatee, in obedience of the Board's mandate, a distributorship agreement and, a few days following, annulling it. Whatever contractual liability might flow from this breach, it concededly could not be styled an unfair labor practice.

Furthermore, remedial liability could also be avoided by a number of possible arrangements which would leave Golden State without the right or authority to pick and choose individual distributors as it pleased.

These considerations are not raised to suggest avenues of escape for reluctant wrongdoers; they are cited, rather, to emphasize the fundamental incongruity, even absurdity, of what the Board has attempted

to do in this case and its total unsuitability, legally and practically speaking, to the situation at hand.

The dissenting opinion of Judge Kilkenny recognized this defect and concluded that the Board's proposed action exceeded its power. Petitioners urge the same view to this Court.

C. The Board Exceeded Its Power in Ordering Petitioners to Pay, Ostensibly as "Back Pay" Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business.

What we have said in the sections immediately preceding applies with equal force to the "back pay" aspects of the Order enforced below. As interpreted by the Board and court, this Order required Petitioners to pay to Baker, for periods subsequent to 1 October 1964, not lost wages or pay which he might have earned as an employee, but rather, anticipated profits which he allegedly would have earned as a distributor.

This, of course, is not reimbursement for back pay; it is an assessment of liability for consequential damages, based upon anticipated, and wholly speculative profits which might have been earned in a hypothetical business never commenced, by a person without prior business experience.

This Order and the Opinion enforcing it are matters of first impression.

No special authority is cited to sustain this novel and remarkable conclusion other than the standard authority contained in the Act itself relating to back pay awards[22] and cases decided pursuant to that unquestioned authority.

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[22]Section 10(c) of the Act, 29 U.S.C. 160(c):

"... the Board ... shall issue and cause to be served on such person an order requiring such person to cease and

Both the Board and the court have avoided coming to grips with other authority which articulates the reasons why the Board is without power to order such relief.

In the landmark case of *Isis Plumbing and Heating Co.*, 138 NLRB No. 97, 51 LRRM 1122 (1962), a majority of the Board, in developing a rationale to justify the payment of interest in back pay awards, emphasized (51 LRRM, at page 1124):

1. That the remedy of back pay may not be considered as being punitive, or in the nature of a fine or penalty imposed against an employer;
2. That it is, rather, based upon the concept of *indebtedness* arising out of an obligation imposed by statute, and
3. As an incident fixed by law to the *employer/employee relationship.*

The foregoing clearly excludes not only damage awards, but anything not incident to the employer's obligation to the employee for *wages*. In the case at bar, the sums which Petitioners are ordered to pay have nothing to do with any wage obligation or employment relationship at all.

In the same *Isis Plumbing* case, the two dissenting members of the Board were at pains to point out (51 LRRM, 1125, *et seq.*) that the term "back pay" as used in the Act was a term of art, and represented a deliberate choice on the part of the Congress between competing policies. In adopting the mentioned language, Congress specifically rejected alter-

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desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this act. . . ." (emphasis added)

native proposals which would have had the effect of giving the Board the much broader power of awarding compensatory or consequential damages.

In other words, the very use of the term "back pay" is a limitation to what the term implies, namely the reimbursement of lost wages, and nothing more.

It is also clear that Congress deliberately intended to withhold from the Board any power to order remedies stemming from non-employment relationships and excluded it from any authority to award damages.

As the language of Section 10(c) plainly says, it is authorized to order reinstatement of employees with or without back pay, that is to say, it is authorized to order them restored to *employment*, and having so said, it has clearly excluded the notion that it is authorized to order them reinstated to non-employment situations or compensated for anything other than lost wages.

The legislative history illuminated by the minority in *Isis Plumbing* merely emphasizes the applicability of the familiar rule, *"expressio unius est exclusio alterius."*

It is equally clear that the court below was of two minds on the subject, since one of the cases cited by Judge Kilkenny in his dissenting opinion, *Brown v. NLRB, supra*, emphasizes the impact upon this issue of the fact that the distributorships were independent businesses and the distributors themselves independent contractors.

The Board's Order and the Opinion itself, in this respect, are equally offensive to settled concepts of damages in the common law, even were that context appropriate, since the damages awarded were wholly speculative, being profits allegedly anticipated from a "start-up" business with no prior operation or earnings history whatever. See, for example, *Macmorris Sales Corporation v. Kozak*, 263 Cal. App. 2d 430, 69 Cal. Rptr. 719 (1968); *Handley v. Guasco*, 165 Cal. App. 2d 703, 322 P. 2d 354 (1958).

The validity of these concepts is underscored by the fact that in the instant case, two of the driver-salesmen who became independent distributors for Golden State went bankrupt [Tr. 271-273], while two other driver-salesmen who accepted distributorships, later asked for and obtained back their former positions as driver-salesmen for the reason that they had been unable to make a go of it as distributors [Tr. 272].

In any event, the Board's attempt to enforce its Order in this manner is, Petitioners urge, erroneous and unlawful.

Conclusion.

Petitioners submit that the Opinion and Judgment of the court below be reversed and remanded with instructions to enter judgment against Petitioner Golden State Bottling Company for the back pay Baker would have earned as a driver-salesman in Golden State's employ from the date he was wrongfully terminated through October 1, 1964. In the alternative, if this court is not

disposed to accept Petitioner's argument in regard to Baker's voluntary termination of employment, Golden State should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of this wrongful termination until the date of sale of the bottling company by Golden State, Jnuary 31, 1968. In either instance, enforcement as against All American should be denied.

Respectfully submitted,

MORTON B. JACKSON,
Attorney for Petitioner Golden State Bottling Co., Inc.

GILFORD G. ROWLAND,
Attorney for Petitioner All American Beverages, Inc.

Of Counsel:
JACKSON & GOODSTEIN,
ROWLAND, CLOWDUS & PARKER.